

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

HAROLD JOHNSON, employed by Caristo, testified as to the origin of materials at the Tinton Avenue site. (4575) He testified about a violent demonstration in November, 1972 in which he was told that Munoz was the leader. However, he was unable to identify Munoz in court. (4579) Johnson stated that he did not know Carlos Cuadrado. (4579)

On cross-examination, Johnson stated that he did not observe Munoz do anything at the site nor did Munoz threaten him. (4581) He stated that Munoz had told him that he could not control the demonstrators. (4582)

CHRISTOPHER HAYES, presently employed by J.P. Stevens Company and formerly with the N.Y.P.D. Bomb Squad, was stipulated to be an expert. (4591) He testified that the May 10, 1973 device at 101st Street and FDR Drive contained smokeless powder. The fuse on the device was a punk. (4596)

On cross-examination, he testified that the metal was smooth. (4599) The device was different in size than the other exhibits. (4599) The witness stated that the device was checked for fingerprints but that he did not know whether any prints had been lifted. (4602)

JOHN SCHLAGER, bomb technician with the N.Y.P.D., was qualified by the Court as an expert. (4605) He stated that the Livonia and Chester site device was an aluminum conduit with a sparkler fuse. (4605)

KENNETH J. DUDONIS, employed by the N.Y.P.D. Bomb Section, was stipulated to be an expert. (4616) He testified that on June 29, 1973, he responded to a call at 101 Street and FDR Drive regarding a pipe bomb. He testified to the bomb's composition. The fuse consisted of a punk. (4620-4621)

On August 8, 1973, at Livonia and Pennsylvania Avenue, he went to an area where a bomb was found. This bomb had a sparkler fuse and smokeless powder. (4628)

On cross-examination, he stated that the components were different in the various Government exhibits (bombs). (4636) He stated that he had mistakenly identified a casing as galvanized pipe in the Grand Jury. (4637) He stated that the Bomb Squad officers had met before they testified and collectively determined that the nipple was designed to cause fragmentation. (4639)

Dubonis stated that he had no knowledge as to who planted the bombs. (4640) No tests were conducted with respect to the threading of the pipe bomb casings. (4645) The January 8, 1973 bomb was made from galvanized metal, with no fuse, no metal nipple and no wafer. (4650)

ROBERT F. BEATUS, from the N.Y.P.D. Crime Laboratory, was qualified as an expert in chemical analysis. (4660) Beatus testified that the bomb contents were analyzed and found to be potassium nitrate and sodium nitrate, the after-products of a low-order explosive burn. "Low order" explosive means a propellant which supplies its own oxygen and liberates large amounts of heat and gases. Such a bomb is capable of causing an explosion. (4662) The bomb also contained cellulose nitrate or smokeless powder, which was manufactured by the du Pont Corporation. (4663)

There were three different kinds of smokeless powder used in the different bombs in the Government's exhibits. (4669)

The Court directed Pichman to permit the Government to make a copy of the tape between Cuadrado, Munoz and James Sims. (4678-4689)

The Court heard argument from counsel on the Rule 29 motions made at the end of the Government's case. The Government consented to dismissal of the extortion counts as to all defendants in Counts 10,11, 15,21 and 26 of the Indictment. As to John Sims, the Government consented to dismissal of all counts except Count 3 of the indictment. As to Eddie Jackson, the Government consented to a dismissal of all counts except Counts 1 and 2. (4689)

DEFENDANT MUNOZ' CASE.

Appellant Robert Munoz called the following persons as character witnesses on his behalf: Hiram Alamo (4870), Robert Corbett (4887), Howard J. Samuels (4897), Hattie Dixon (4919), Donald Menzi (4925), Edward Roper (4938), Eliseo Quinones (4946), Sen. Joseph L. Galiber (4953), Amelia Betanzos (4964), Raymond Rios (4971), John Gay (4975), Evalina Antonetti (4982), Elnar Petersen, publisher of El Tiempo (4992), Don L. Pessante (4996), Caesar Chavez (5191), Pfain Gonzalez (5579), Edward Mercado (5584) and Sister Miriam Thomas Collins (5589). Each of the witnesses testified that Munoz' reputation in the community and in their personal experiences for truthfulness, veracity and peaceableness was excellent. Additionally, Mr. Samuels stated that he did not believe that Munoz was involved in the OTB bombing attempts. Caesar Chavez testified that his own union members had been wrongfully accused of firebombing A & P Stores which bombings were later traced to an organized crime operation's attempt to promote a detergent product.

ROBERT MUNOZ testified in his own behalf. (5025) He described his varied work background with HPCC, SEPA and with other city and federally funded agencies, as well as his association as Vice President of the New York City Taxidivers Local 3036. (5027) He described the scope of the Hunts Point Community Corporation and its 21 delegate agencies. (5032) Munoz testified about the formation of the Coalition to promote minority participation in the building trades. (5040)

Munoz testified that he was shot in 1972. (5048) Munoz expressed his belief that construction people were behind the incident. (5051) Munoz filed a police report of the shooting in 1972 which expressed such a view. (5070) The bullet had pierced his arm through his suit and overcoat. (5073)

Subsequently, Munoz obtained a pistol permit which he had until the indictment in this case. (5078-5079) Munoz denied that he ever displayed

the gun in public. (5079) The permit was suspended upon his arrest in the instant case. (5079)

Munoz testified that he met Fruto Alicea through James Sims in 1972. Munoz denied that he referred Alicea to OTB. (5082) Munoz stated that Alicea was given a job with the Neighborhood Youth Corps, one of the delegate agencies. (5082) Munoz denied that he saw Alicea frequently and that the only relationship between them was employer-employee. (5083) To his knowledge Alicea was James Sims' brother or half-brother. In 1973, Munoz terminated Alicea's employment with HPCC because of his excessive absenteeism and lateness. (5084)

On July 16, 1973, the day after Alicea was fired the HPCC offices were burned down and totally destroyed. (5086)

Munoz denied meeting with Alicea regarding any bombings. (5088) Munoz asserted that Alicea was not a part of the Coalition Council. (5088) Munoz denied having contact with Alicea after Alicea's termination at HPCC.

After the fire, HPCC made temporary use of offices at 149th Street of Third Avenue (Brotherhood of Minority Contractors). Subsequently, HPCC moved its offices to 809 Southern Boulevard on December 18, 1973. (5089) Munoz contradicted Alicea regarding any meetings at 809 Southern Boulevard. Alicea went into the hospital for eleven months starting in October, 1973. Munoz also denied lending Alicea money in 1974. (5091)

Munoz testified that he earned \$19,400. as executive director of HPCC and \$240.00 a week as a consultant to the Brotherhood of Minority Contractors. (5092) Munoz offered a copy of his income tax return in evidence. (5093) Munoz testified about the various awards he received for his service in the Puerto Rican community. (5097-5099)

Munoz testified that a "hit" meant a demonstration at a site. (5099) Munoz denied that he ever used the term "light bulb." (5099)

Munoz denied that he ever received money, directly or indirectly, as the result of a violent act. Munoz denied that he ever gave a bomb to anybody nor did he direct the placing of any bombs or arsons. (5099)

Munoz testified that the purpose of demonstrating at the construction sites was to secure employment for minority workers in the well paying construction industry and to obtain union books. (5100) Munoz stated that close to 3000 Black and Puerto Rican workers received jobs through the efforts of the Coalition. (5101)

Munoz testified that he received threats against his family when the demonstrations first began. (5101) Munoz notified the police of these telephone threats. (5102) Munoz also received bomb threats at the HPCC offices which required evacuation from the building to permit the bomb squad to check the premises. (5102)

On cross-examination by counsel for the co-defendants, Munoz testified that he knew James Sims since 1969. That Sims had already been employed at HPCC when Munoz became the executive director. (5104) Sims was a psychometrician, an aptitude tester and teletype instructor.

Munoz stated that he confronted Sims about his alleged relationship with Miodalia Ortiz, who was then a trainee in Sims' program. (5106)

Munoz testified that Sims never told him he had placed a bomb nor did Munoz instruct Sims to place a pipe bomb. Munoz specifically denied that he ever gave Sims a bomb. (5107)

Munoz testified that between 100 and 200 demonstrations were conducted during 1973. (5111) The Coalition provided the demonstrators with carfare money and lunch money as a general rule. (5112) The community liaisons supplied this money from the monies they received as pay. (5112) Munoz stated that Sims was the Executive Director of the Coalition, which was not a funded corporation. (5113) Munoz stated that community liaisons were hired by contractors to assist the contractor in the community and to provide laborers at the site. (5119)

Munoz testified that it was the Coalition's policy that if a laborer failed to perform the work that the foreman at the site was to terminate that laborer and notify the Coalition to obtain a replacement. (5161)

The Coalition was an amalgamation of 12 or 13 community organizations. (5163) No dues were collected from the members. (5165) The community co-ordinators were responsible for identifying sites where potential job slots were available for the laborers. (5167)

Munoz denied that he participated in any conversation with Sims and Alicea regarding Eddie Jackson messing up a bombing. (5175)

On cross-examination by the Government, Munoz was questioned at length about his changes of address. (5206) Munoz denied ever "slugging" or hitting anyone at the DeMatteis site. (5218)

Munoz stated that the co-ordinators' money was spent for sandwiches, work shoes, carfare and gasoline for the demonstrators. (5237) Munoz was questioned about the checking accounts maintained by the Coalition. (5241)

Munoz was questioned about his appearances before the Grand Jury at which he was requested to produce records of the Coalition. (5256) Munoz testified that he produced all the records in his possession. (5263) Munoz appeared in the Grand Jury without necessity of a subpoena. (5269, 5304)

Munoz testified that he never deposited any money into the Coalition account. (5289) He was requested to endorse Coalition checks occasionally. (5289) Munoz testified that 11 or 12 members composed the council of the Coalition in 1974. (5311)

Munoz testified about the opening and closing of the Coalition's bank accounts. (5325-5330) Munoz denied that any of the accounts were closed to avoid production of records before the Grand Jury. (5339)

Munoz testified that he couldn't find most of the records of the Coalition. (5370) The records were in a locked office for which Munoz did not have the key. (5372) Munoz resigned as President of the Coalition because Sims and Cuadrado did not give him access to the records. (5390) Cuadrado succeeded Munoz as President. (5391)

Munoz was questioned at great length regarding the checking accounts

maintained by the Coalition. (5394-5401) Munoz stated that money received by the Coalition was used for transportation, gasoline, etc. for the demonstrators. (5396)

Munoz described the functions of the liaisons and the fact that the Coalition were heavily dependent upon the liaisons to obtain jobs. (5425)

Munoz was questioned about his associations with Cuadrado at HPCC and SEPA. (5435-5439) The Government sought to impeach the credibility of Cuadrado. (5440)

Munoz denied ever having threatened Montana. (5522) Munoz denied that he was ever the director of the Coalition. (5536)

On re-direct, Munoz stated that he was not charged with perjury or failing to co-operate with the Government as the result of his Grand Jury appearances. (5538)

Munoz stated that while Fernandez worked for him he had not pleaded guilty to the OTR bombing; in fact, she told Munoz that she was innocent. (5549) Fernandez plead guilty to the bombing six months after Munoz had left HPCC. (5550)

Munoz stated, on re-cross, that Cuadrado told him he was under pressure because of the indictments against him. (5564)

DEFENDANT JAMES SIMS' CASE

RONALD MIKELL, a member of the Coalition, stated that he obtained a construction job through the efforts of the Coalition. Previously to his employment Mikell had been in prison. (5597) Mikell testified that Sims never asked for or received money from him. (5597) Mikell estimated that 1500 persons were employed through the efforts of the Coalition. (5598) He stated that Sims gave him carfare for the demonstrations. (5599)

TREVOR SIMPSON, a Coalition member, testified that he received several jobs through the Coalition. He never paid anyone for obtaining his jobs. (5616) He stated that a construction man called Jesse James (Jesse Tannenbaum) laid him and others off the day after they received their union books. (5618) Simpson had to borrow the money to pay for the union permit. (5621)

HUBERT HENRY testified that in 1973 he received a construction job as a laborer at \$7.90 an hour. (5634) James Sims helped him obtain that job. Henry stated that he gave Migdalia Ortiz \$50.00 to return to James Sims. (5635) He still owed Sims \$25.00. Henry stated that the money was a loan which he had borrowed from Sims to cover his losses in a card game. Henry denied ever paying Sims for obtaining his job for him. (5635)

Henry was not called as a witness by the Government nor was he contacted by Government agents to be a witness at the trial. (5636)

JOHN RODRIGUEZ, a construction worker, stated that he was a member of the Coalition. (5639) He knew that Frank Sims, Brother Black, James Sims, Robert Munoz, Cuadrado and Brother Zulu were members of the council. (5640) Rodriguez never paid money to obtain his job. He received carfare and lunch money at demonstrations. (5641)

EUSTACE PAUL, a concrete worker, is a member of the Coalition. He too received carfare and lunch money. (5644-5645) He testified about a demonstration at City College where union workers threw bolts at the demonstrators. (5645)

On cross-examination, Mr. Paul stated that the liaison gave the demonstrators lunch money and money for gasoline for car pools. (5649)

JUNE CATHERINE GUNN, Chairman of the citywide Coalition of Black, Hispanic and Asians in Construction, testified that the Black and Puerto Rican Coalition was one of 14 organizations affiliated with her group. (5652) The organizations met twice a week. She testified to violence directed at the demonstrators at the City College site. (5654)

DAVID SANCHEZ, a member of the Coalition, testified that Sims helped him get a job. (5664) He stated that he participated in demonstrations that were peaceful. (5664) He never paid anyone to obtain his job. Sanchez stated that Sims led 80% of the demonstrations. (5665)

HAROLD RODOLPHE testified that "checkerboarding" meant the moving of minority workers from site to site, so that contractors could say they had minority workers on each site. (5673-5674) This was a common term in the construction

industry.

TERESA MARY SIMS, the sister of the Appellant James Sims, testified about the incident involving Fruto Alicea and Ortiz' son. (5698) The Trial Court had previously directed her not to use the term sodomy in the presence of the jury. (5692) Ms. Sims stated that Ortiz never mentioned pipe bombs, arsons or grenades to her even though they were very close and went shopping together regularly. (5697) Ms. Sims stated that Fruto and James Sims argued and cursed at each other over the incident with Ortiz' child. (5698-5699) Fruto's wife called Fruto a "pervert." (5698)

The witness stated that Ortiz left her children unattended and brutalized the children as well. (5700)

Ms. Sims stated that she was present when Ortiz received the subpoena to appear in the Grand Jury. The incident took place of December 17, 1974. Ortiz told her that she had to go down the next day. (5701) Ortiz complained that she needed a baby sitter. (5702)

Ms. Sims stated that both Fruto and Ortiz heard Frank Sims and James Sims talking about the offers made to them to testify against Munoz including a new identity, protection, money and other benefits. (5703)

ALMA SIMS testified that she knew Ortiz, but that Ortiz never mentioned gasoline cans, bombs or grenades to her. (5712) Mrs. Sims stated that Ortiz was a cruel mother. (5713) Mrs. Sims stated that on her birthday that Alicea called her and wished her a "happy birthday" from her "black sheep son". Alicea told her that he would not testify against her sons, but only against Munoz because Munoz had money. Alicea stated that he hated Munoz for not giving him money. Alicea said he would testify against Munoz and even lie against Munoz. (5715)

Mrs. Sims denied that she was forced to go to any demonstrations. (5716)

James Sims rested his case. John Sims, Frank Sims, Cleo Williams and Eddie Jackson rested their cases without calling any witnesses. (5723) After lengthy deliberations Munoz and James Sims were convicted on Count One of the indictment.

During the trial, with the jury excused, former Assistant United States Attorney Feinberg was called to testify regarding Miodalia Ortiz.

Feinberg testified that Alicea apprised him of Ortiz' existence on December 3rd or 4th, 1974. (2634) Feinberg did not subpoena Ortiz until after the second indictment on December 11, 1974, at which time Alicea was placed under protective custody. (2638) From December 11th until December 18th or 19th, Alicea was being debriefed by the agents. (2639) On December 27th, Ortiz was called before a different Grand Jury. (2640)

Ortiz was given introductory warnings and she expressed a desire to invoke the Fifth Amendment. (2642) Seven times Feinberg explained the scope of the Fifth Amendment privilege and finally Ortiz answered some questions. (2643,2698) Feinberg determined that Ortiz' responses were not truthful. (2644) Outside the Grand Jury room, Feinberg immediately advised Ortiz that she made a mistake by lying: that she was not a target. Ortiz was given a second subpoena which had already been prepared. (2646)

On cross-examination, Feinberg asserted that it had been determined previously not to start the investigation of Ortiz until December 27th, one day after the expiration of the Grand Jury that handed up the indictment. (2656)

Feinberg thought that Ortiz had been served with a forthwith subpoena on either December 26th or 27th. (2661) Feinberg acknowledged that it was not necessary to have a person appear in the Grand Jury in order to use that person as a witness at a later trial. (2671-2673) Ortiz invoked the Fifth Amendment seven or eight times. (2673,2687) Feinberg was aware of the rulings in the cases of Dardi and Fisher at the time with regard to the use of the Grand Jury to freeze testimony. (2682-2683)

Feinberg brought Ortiz into the Grand Jury without interviewing her. This was an uncommon procedure but not unprecedented. (2719) Feinberg stated that Ortiz was the only witness who testified after the second indictment. (2727) Feinberg stated that recantation could have been accomplished by affidavit as well. (2733)

POINT I

THE EVIDENCE WAS INSUFFICIENT AS A MATTER
OF LAW TO CONVICT THE APPELLANTS MUNOZ AND
JAMES SIMS OF THE CRIME OF CONSPIRACY

Prior to the submission of the case to the jury, counsel for the Appellant Munoz and counsel for Sims independently moved for a verdict of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The motions were denied. This was error because a reasonable mind could not fairly conclude beyond a reasonable doubt and the judgment of conviction should be reversed and the indictment dismissed. United States v. Fantuzzi, 463 F.2d 683 (2nd Cir. 1972); United States v. Geaney, 417 F.2d 1116 (2nd Cir. 1969); United States v. Freeman, (2nd Cir. 1974) Docket No. 74-1238 Decided June 7, 1974; United States v. Taylor, 464 F.2d 240 (2nd Cir. 1972).

With respect to the Appellant Munoz, the principal witness against him was Fruto Alicea, who by his own admission had participated in eleven or twelve bombings or arsons. Alicea had repeatedly been discharged from employment because of excessive lateness and absenteeism. In fact, Munoz, himself, discharged him from his employment at the Hunts Point Community Corporation for that very reason in July, 1973.

Fruto Alicea's testimony if believed by the jury would have incriminated defendants, John Sims, Frank Sims, Eddie Jackson, Cleo Williams, James Sims and Robert Munoz, in all of the substantive counts in the indictment with which they were charged. Alicea asserted actual participation on the part of James Sims, Frank Sims, Eddie Jackson and John Sims in several of the bombings and arsons. Nevertheless, the jury resoundingly found such testimony unworthy of belief by returning a verdict of acquittal as to each and every substantive count in the indictment.

Alicea specifically alleged that Munoz handed a pipe bomb to James Sims, who in turn gave it to Alicea, while all three were in Munoz' office at HPCC.

This bomb was allegedly used in one of the substantive counts in the indictment. The jury's verdict of acquittal put to lie Alicea's account of this alleged incident. Alicea asserted that Munoz informed him after he began working at HPOC that he was to go on assignments with James Sims. Sims, it was alleged, instructed Alicea regarding the bombings and arsons. Ironically, Alicea testified that Munoz never gave him instructions regarding the bombings or arsons. This was in marked contrast with Alicea's account of Munoz's participation in the similar acts against A & P, Korvette's, Alexander's and the Daily News, where Munoz allegedly gave the orders.

The other, so-called inside witnesses were Miodalia Ortiz, Estelle Fernandez, Carlos Cuadrado and Warnell Vega. Ms. Ortiz stated that she never met Munoz at any of the meetings at her apartment or had any direct dealings with him. She testified that Alicea, James Sims, Frank Sims and Eddie Jackson were present at the meetings. She stated that the discussion at the meetings referred to hits or jobs, and never to bombings or arson. Testimony was elicited from various witnesses that a "hit" meant a demonstration at a site seeking jobs for minorities. Warnell Vega did not inculcate Munoz in his testimony. Vega testified regarding the term "light bulb" which he stated referred to a bomb. Vega specifically stated that Munoz never used that term.

Finally, Carlos Cuadrado called by the Government was not asked questions regarding Munoz on direct examination. Cuadrado, on cross-examination, stated that to his knowledge that Munoz was not involved in the conspiracy. Estelle Fernandez testified to demonstrations not charged in the indictment. She stated that demonstrations conducted by Munoz were peaceful while he was in charge. Fernandez stated that Munoz did not direct her to bomb the OTB office and, in fact, did not learn of it until after the event. This markedly contradicted Alicea who asserted that Munoz gave the instructions.

The witnesses from the construction industry testified, with one except-

ion, that Munoz did not raise his voice in negotiations and did not threaten them. Montana, the exception, stated merely that he felt under pressure because the job at the Ford showroom was his largest to date and felt that he had to agree to terms or he would be ruined. None of the contractors accused Munoz of personally damaging their property or of having knowledge of who committed the damage.

The episode in which the Government tried to establish that Amenqual paid for arsons and bombings against contractors to induce them to offer him a subcontract was totally unsubstantiated. Amenqual specifically denied any involvement in the bombings and the payments to Sims and Cuadrado for their assistance in contacting UDC representing his plight before that organization were made by check clearly marked as consultant fees.

It is not contested that Munoz followed a pattern of demonstrating at various construction sites searching to employ minority workers at those sites and to induce the unions to issue union books to blacks and Puerto Ricans who formerly had been excluded from union membership. It cannot be seriously contended that such activity violated any law, either Federal or state. There was no testimony offered by any witness that indicated that Munoz ever asked for or received any money or other compensation for himself in connection with his dealings with the construction men. It was also unrefuted that through the efforts of the Coalition of Black and Puerto Ricans that somewhere between 1500 and 4000 minority workers were employed in the high-paying construction industry.

With respect to the Appellant, James Sims, the testimony was perhaps more voluminous but not more reliable. Again, if Alicea was worthy of belief then Sims would have been convicted on upwards of twenty substantive counts. The record discloses that Alicea and Sims had a violent argument regarding allegations of sodomy against Alicea. Ms. Ortiz was found by the Court to have a motive to lie against Sims based upon the severance of their relation-

ship and his failure to support the child she bore him.

Ortiz' assertion that Hubert Henry paid Sims for obtaining his job was refuted by Mr. Henry's own testimony, as a defense witness, that the money was a loan Sims had made to him to cover his losses at a card game. The Government made no attempt to contact Henry prior to the trial in order to ascertain the truth of Ortiz' allegation. This despite the fact that Ortiz was an admitted perjurer who had lied in the Grand Jury between 13 and 15 times.

The testimony of the contractors regarding the promotion of Amenqual's company, Fast Electric, best illustrates the absence of any conspiracy. Although initially both Munoz and Sims assert that Amenqual's company (a minority contractor) is favored by the community, well before the award of the subcontract to Fast Electric Munoz stated that Amenqual was no longer working with the community. James S' , however, was still promoting Amenqual's firm as indicated by Hochberger's testimony. Indeed, on June 5, 1973, about one month before Fast Electric received the contract, Sims purportedly informed Hochberger that he disagreed with Munoz and that he and Munoz were not on speaking terms. This is hardly indicative of the actions of two co-conspirators.

Hochberger indicated by letter that his company enjoyed a harmonious relationship with the Brotherhood of Minority Contractors (Munoz' organization) and that Munoz did not threaten him. Likewise, Hochberger indicated that Sims made no threats to him either.

Additionally, the police reports mentioned in connection with the alleged bombings and arsons described the perpetrator or perpetrators as Male, White, age 25 to 30, with blond hair. Neither Sims nor Alicea fit the descriptions.

It is apparent from the jury's verdict that the jury did not place any credence in the testimony of Alicea and Ortiz, the only two individuals who did not testify before the first Grand Jury whose testimony as against Munoz and Sims could be deemed incriminating if believed. If their testimony

is discounted as it should be, then the only theory upon which to premise a conspiracy rests on the direct negotiations which Munoz and Sims had with the contractors regarding the "shapes" and the placement of liaisons of the sites.

While the methods employed by the Coalition may not have resembled the methods employed by established labor unions, it is respectfully urged that the special needs of the minority workers required the type of demonstrations in which the Coalition participated. Indeed, even the Court, in its charge to the jury, acknowledged that incidental violence which occurred at the site of a bonafide labor dispute would not give rise to criminal liability. Thus if a demonstration led by Munoz or Sims went out of control spontaneously, and without the direction, of any of the alleged conspirators, such act could not be construed as being in furtherance of the conspiracy, if in fact a conspiracy existed.

It is submitted that not only is the non-hearsay evidence insufficient as a matter of law to make the Appellants Munoz and Sims a member of a criminal conspiracy, but that, all the evidence, hearsay and non-hearsay is legally insufficient to make either of them a member of any conspiracy by proof beyond a reasonable doubt.

PAGE II

THE ACTION OF THE GOVERNMENT IN OFFERING PERJURED TESTIMONY IN THE GRAND JURY AND SUBSEQUENTLY AT THE TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT. SUCH MISCONDUCT DEPRIVED THE APPELLANTS OF A FAIR TRIAL.

A) CALLING CUADRADO AS A WITNESS WITH KNOWLEDGE THAT HE WOULD COMMIT PERJURY WAS DESIGNED TO PREJUDICE MUNOZ

During the trial the Government called Carlos Cuadrado, although they were aware that his testimony would be perjurious. Moreover, the Government did not advise the Court that this witness would testify falsely, as they had done in the case of the witness Sam Amenqual.

The actions of the prosecution in this regard are in clear violation of the subordination of perjury statute.* In the recent decision of United States ex rel. Washington v. Vincent, 525 F.2d 262 (2nd Cir. 1975) this Court held that where a prosecutor stands silently by while a crucial witness perjures himself , and the prosecution knows that his testimony is perjured, such misbehavior constitutes the denial of fundamental due process in violation of the Constitution and requires a new trial.

In the instant case, the calling of Cuadrado and his subsequent handling of the Government during questioning had a most damaging effect of the Appellant Munoz. The Government was aware of the fact that Cuadrado, despite his prospective testimony inculcating some of the defendants would, in fact, give testimony if asked exculpating Munoz from any involvement in the conspiracy. The Government explained that it did not seek to involve Munoz and, therefore, did not inquire as to Munoz on its direct examination of Cuadrado. In fact, such a tactic, set a trap for defense counsel by causing him to ask the

* Title 18 U.S.C. 1622 provides that " whoever procures another to commit any perjury is guilty of subornation of perjury...."

witness questions and thereby enable the Government to develop on re-direct the relationship between Munoz and Cuadrado.

By having the defense elicit from the witness the exculpatory responses the Government sought to import a perjurious aura to the statements and to imply that the Appellant or his attorney had influenced improperly his testimony. The Government had been aware over a year prior to the trial what the witness would testify to. Nevertheless, the Government permitted and, in fact, fostered the belief that Munoz had recently influenced Cuadrado to exculpate him of any wrongdoing.

When the defense offered a tape of Cuadrado in which Cuadrado stated that he was being pressured to testify against Sims and Munoz, Cuadrado denied that his voice was on the tape. It was patently obvious that the voice was that of Cuadrado. The Trial Court made a finding that Cuadrado was unworthy of belief and included such finding in her charge to the Jury. The unfortunate effect of that finding was that the jury was almost, necessarily, influenced into discounting Cuadrado's exculpatory statements regarding Munoz as well as Cuadrado's other testimony. If the jury found that Cuadrado lied about his testimony on direct, it might also have found that he lied under cross-examination. The result being that the jury might infer that he lied when he asserted that Munoz was not involved.

It has been held that where the use of false testimony by the Government may have an effect on the outcome of the trial, that the introduction of such evidence violates due process. In the instant case, the Government not only permitted the introduction of such false evidence but would have knowingly permitted it to go uncorrected save for the diligent cross-examination by defense counsel. See Mooney v. Illinois, 360 U.S. 264, 3 L. ed.2d 1217 (1959) Mooney v. Holohan, 294 U.S. 103, 79 F.2d. 791 (1935) Thus "a conviction obtained through the use of testimony known ... to be untrue must fall if the false testimony could ... in any likelihood have affected the judgment of the jury... (or if) the false testimony used ... in securing the conviction may have had an effect

on the outcome of the trial." Giglio v. United States, 405 U.S. 150, at 154, 92 S.Ct. 761, at 766.

Finally in the case of United States v. Panks, 383 F. Supp. 389 (S.D.W.D. 1974) the Court exercising its supervisory powers over the administration of justice dismissed the indictment in the interests of justice. Citing Mc Nabb v. United States, 318 U.S. 332, 87 L.ed. 819 (1942), the Court observed that it had a duty to " establish and maintain civilized standards of procedure and evidence.", and that such power extended to government attorneys and enforcement officers within the court's district. The Court there noted with respect to false testimony that " even if false testimony is volunteered by the witness and takes the prosecutor by surprise rather than being solicited by him, if he knows it is false he has the obligation to see that it is corrected." United States v. Poole, 379 F.2d 642 (7th Cir. 1967)

As will be illustrated in the next subdivision of this point heading the conduct of the trial clearly indicates that the prosecution was aware of the nature of the perjured testimony well in advance of the trial.

B) THE USE OF LEADING QUESTIONS TO
THE MAJOR WITNESSES IN THE GRAND JURY
PERPETRATED A FRAUD UPON THE FUNCTION
OF THE GRAND JURY PROCEEDING AND
RENDERED THE INDICTMENT INVALID

Although the Supreme Court has ruled that " an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence"; Costello v. United States, 350 U.S. 359, 100 L.ed. 397 (1956); " or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, Lynn v. United States, 355 U.S. 330, 78 S. Ct. 311 (1958), there are exceptions to this rule.

The general rule is qualified in those instances where the grand jury is misled into thinking that the testimony it is receiving was of better quality than it was actually receiving. So, in United States v. Estena,

471 F.2d 1132-1136 (2nd Cir. 1973) this Court held that where the grand jury is "misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed" that the convictions should be reversed and the indictments dismissed.

In the instant case, the prosecution embarked on a calculated pattern of addressing leading witnesses to key witnesses during the Grand Jury proceedings. Although the mere use of leading questions may not, in and of itself, give rise to infirmity of the indictment, in this case, the Grand Jury was grievously misled by such tactics.

On cross-examination at the trial, Alicea stated that none of the dates in the indictment meant any thing to him; that he could not remember those dates either at the time of trial or when he testified in the Grand Jury. The Grand Jury, however, never was apprised that Alicea's memory was so faulty. Had such information been provided to the Grand Jury they might well of declined to hand up the second indictment in December, 1974. This is of paramount importance since Munoz, John Sims and Eddie Jackson had not been named at all in the prior indictment.

The Grand Jury had previously heard 1460 pages of testimony and still had not indicted Munoz. Alicea's testimony consisting of only 40 additional pages had a telling effect, since it, and it alone, gave rise to the second indictment. The situation in the instant case, is in marked contrast with the case of United States v. James, 493 F.2d 323 (2nd Cir. 1974). In the James case the Court found that there was ample evidence presented to the Grand Jury in addition to the evidence which was of doubtful admissibility. In this case, it is undisputed that the Government was unable to muster an indictment against the Appellant Munoz without Alicea's testimony which can be characterized as misleading and perjurious.

The Government cannot validly claim that the Alicea episode was accidental or without design. The questioning of the other so-called "inside" witnesses including Miodalia Ortiz, Estelle Fernandez, Warnell Vega and Carlos Cuadrado followed the same ponderous pattern. The Grand Jury in these instances was likewise unable to determine what independent information these witnesses had to offer since the Government's questioning merely required monosyllabic responses in reply.

It has been held that the purpose of a Grand Jury's inquiry is to get at facts which enable it to determine whether formal charges should be made against someone. Dolan v. United States, 218 F.2d 454, cert. den. 349 U.S. 923 (C.A. No. 1955) In the case at bar, it is clear that the Grand Jury was not permitted to function in accordance with the stated purpose. It became a prosecutor's tool designed solely to get the prosecutor's view of the case before the Grand Jury, rather than permit the Grand Jury to receive forthright testimony from the witnesses appearing before it.

C) THE USE OF THE GRAND JURY AFTER INDICTMENT
FOR THE SOLE OR PREDOMINANT PURPOSE OF
FREEZING TESTIMONY CONSTITUTES PROSECUTORIAL
MISCONDUCT

Miodalia Ortiz and Warnell Vega were called to testify before a subsequent Grand Jury rather than the Grand Jury which handed up the second indictment. A review of their Grand Jury testimony reveals that the prosecution employed this technique for the sole or dominant purpose of freezing their testimony.

In the case of United States v. Dardi, 330 F.2d 316, 336 (2nd Cir. 1964), the Court recognized the principle of law that " it is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial." In the Dardi case the Court did not reverse the convictions because it found that the prosecution was engaged in a good faith continuing investigation. The record, in the instant case, is devoid of any such good faith showing by the prosecution. The questions posed to Ortiz and Vega related solely

to persons and events already covered by the existing indictment. No attempt to expand the scope of the investigation is evident.

Subsequent to Dardi, the Circuit Court had yet another occasion to admonish the prosecutor against the use of the Grand Jury improperly to freeze testimony. In the case of United States v. Fisher, 455 F.2d 1101, at 1104 (C.A.N.Y. 1972), the Court stated:

" The Assistant United States Attorney who argued this appeal candidly admitted that this use of the grand jury was improper, but he indicated that "freezing" testimony by some means is commonplace. We agree. The Government could easily have obtained an affidavit from Singleton containing all the information that was elicited before the grand jury. It is true that the Government's conduct cannot be justified and should not be repeated : the grand jury is not meant to be the private tool of a prosecutor...."

Over two years after the warning in Fisher, the government's attorney have still not heeded the Court's admonition not to abuse the processes of the Grand Jury. The imposition of sanctions, whether the granting of a new trial or the dismissal of the indictment, may be the only means to make the Government cognizant of its obligation not to violate and defile the confines of the Grand Jury.

The case of United States v. Del Toro, 513 F.2d 656 (C.A.N.Y. 1975) is likewise distinguishable from the instant case. In that case, like Dardi, there was evidence of a continuing investigation. Del Toro, acknowledged, however, that there may be situations where strictures should apply as where the Grand Jury is used for the sole purpose of preparing an already pending indictment for trial.

The series of prosecutorial abuse clearly establishes a plan of attack which was cold and calculated. The prosecution ought not be excused from the consequences of its acts. The remedy to be afforded the Appellants in the light of the prejudice they suffered must be sufficient to deter the prosecution from engaging in such practices in the future.

POINT III

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, THE APPELLANTS MUNOZ AND SIMS HEREBY ADOPT BY REFERENCE THE POINTS AND ARGUMENTS OF THE OTHER APPELLANT INsofar AS THEY MAY HAVE APPLICATION TO THE APPELLANTS MUNOZ AND SIMS.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT BELOW SHOULD BE REVERSED AND THE CASE REMANDED TO THE DISTRICT COURT WITH THE DIRECTION THAT THE INDICTMENT BE DISMISSED AS TO THE APPELLANTS, OR, IN THE ALTERNATIVE, THAT THE APPELLANTS BE GRANTED A NEW TRIAL.

Respectfully submitted,

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Attorney for the Appellants

**COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

appellee

- against -

Robert Murray is for vs Simon
appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK**

ss.:

I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York

That on the 26th day of May 19 76 at One St. Andrews Plaza, New York, New York
deponent served the annexed Appendix Brief upon

Robert B. Fiske Jr.,

the Attorney in this action by delivering ² true copy ² thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein.

Sworn to before me, this 26th
day of May 19 76

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977